

108TH CONGRESS  
2D SESSION

# H. R. 5404

To prohibit price gouging during a shortage of a covered vaccine.

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IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 19, 2004

Mr. KUCINICH introduced the following bill; which was referred to the  
Committee on Energy and Commerce

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## A BILL

To prohibit price gouging during a shortage of a covered  
vaccine.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Vaccine Price  
5 Act of 2004”.

6 **SEC. 2. PROHIBITION AGAINST PRICE GOUGING DURING A**  
7 **SHORTAGE OF A COVERED VACCINE.**

8 (a) PROHIBITION.—No person shall introduce or de-  
9 liver for introduction into interstate commerce any covered  
10 vaccine with a price in violation of this section.

1 (b) UNLAWFUL PRICE.—The price of a covered vac-  
2 cine is in violation of this section if—

3 (1) at the time the vaccine is offered for sale  
4 at such price—

5 (A) there is in effect a declaration of a  
6 shortage of the vaccine under subsection (c); or

7 (B) the seller knows or has substantial  
8 reason to believe there will be a shortage of the  
9 vaccine within a period of 60 days, and not  
10 later than the end of such period there is in ef-  
11 fect a declaration of a shortage of the vaccine  
12 under subsection (c); and

13 (2) the price of the vaccine per dose is at least  
14 150 percent of the baseline price of the vaccine per  
15 dose (as determined under subsection (d)).

16 (c) DECLARATION OF VACCINE SHORTAGE.—For any  
17 period for which the Secretary of Health and Human  
18 Services determines there will be a shortage of a covered  
19 vaccine, the Secretary may declare a shortage of that vac-  
20 cine for purposes of this Act.

21 (d) BASELINE PRICE DETERMINATION.—

22 (1) IN GENERAL.—Subject to paragraph (2),  
23 the baseline price of a covered vaccine per dose is—

24 (A) the average price of the brand of vac-  
25 cine per dose offered for sale by the seller on

1 the date that is 60 days before the effective  
2 date of the applicable declaration under sub-  
3 section (c);

4 (B) if the seller did not offer for sale the  
5 brand of vaccine on the date described in sub-  
6 paragraph (A), the average price of the brand  
7 of vaccine per dose offered by the seller during  
8 the 12-month period preceding such date; or

9 (C) if the seller did not offer for sale the  
10 brand of vaccine on the date described in para-  
11 graph (1)(A) or during the period described in  
12 paragraph (1)(B), the price determined by the  
13 Secretary under paragraph (3).

14 (2) EXCEPTION.—If the Secretary finds that  
15 the average price of a covered vaccine is substan-  
16 tially different at the time of a declaration of a  
17 shortage of that vaccine under subsection (c) than  
18 the average price of the vaccine during the 12-month  
19 period preceding such declaration because of factors  
20 wholly unrelated to the causes of the shortage, the  
21 Secretary may determine an appropriate baseline  
22 price of the vaccine.

23 (3) TIMING OF DETERMINATIONS BY SEC-  
24 RETARY.—At the time of declaring a shortage of a  
25 covered vaccine under subsection (c), the Secretary

1 shall determine an appropriate baseline price of the  
2 vaccine per dose for purposes of paragraph (1)(C)  
3 and, if applicable, for purposes of paragraph (2).

4 (e) PENALTIES.—

5 (1) IN GENERAL.—Any person who violates  
6 subsection (a) shall be imprisoned for not more than  
7 30 days, fined in the amount described in paragraph  
8 (2), or both. Each violation of subsection (a) re-  
9 specting a separate dose of a covered vaccine con-  
10 stitutes a separate offense.

11 (2) AMOUNT.—The amount of a fine under  
12 paragraph (1) shall be, for each dose of covered vac-  
13 cine sold at a price in violation of this section, 3  
14 times the amount of the difference between such  
15 price and the applicable baseline price.

16 (f) CITIZEN SUITS.—

17 (1) IN GENERAL.—Except as provided in para-  
18 graph (2), any person may commence a civil action  
19 on his own behalf to compel compliance with sub-  
20 section (a) against any person (including the United  
21 States and any other governmental instrumentality  
22 or agency to the extent permitted by the Eleventh  
23 Amendment to the Constitution) for any alleged vio-  
24 lation of subsection (a). The United States district  
25 courts shall have jurisdiction, without regard to the

1 amount in controversy or the citizenship of the par-  
2 ties, to compel compliance with such subsection.

3 (2) NOTICE REQUIRED.—No action may be  
4 commenced under this subsection—

5 (A) prior to 30 days after the plaintiff has  
6 given notice of the alleged violation (in such  
7 manner as the Secretary may require) to the  
8 Secretary and to each alleged violator of sub-  
9 section (a); or

10 (B) if the Secretary or the Attorney Gen-  
11 eral of the United States has commenced and  
12 is diligently prosecuting a criminal or civil ac-  
13 tion in a court of the United States to require  
14 each such alleged violator to comply with sub-  
15 section (a), but in any such civil action in a  
16 court of the United States any person may in-  
17 tervene as a matter of right.

18 (3) INTERVENTION.—In any action under this  
19 subsection, the Secretary or the Attorney General of  
20 the United States, if not a party, may intervene as  
21 a matter of right.

22 (4) AWARD OF COSTS.—The court, in issuing  
23 any final order in any action brought under this sub-  
24 section, may award costs of litigation (including rea-  
25 sonable attorney and expert witness fees) to any

1 party whenever the court determines such an award  
2 is appropriate.

3 (g) ACTION FOR DAMAGES.—If a person purchases  
4 a covered vaccine at a price in violation of this section,  
5 the person may bring a civil action against the seller of  
6 the vaccine in a district court of the United States to re-  
7 cover—

8 (1) the amount that is 3 times the amount of  
9 the difference between such price and the applicable  
10 baseline price; and

11 (2) the costs of the action (including reasonable  
12 attorney and expert witness fees).

13 (h) NO PREEMPTION.—Nothing in this Act shall be  
14 construed as—

15 (1) affecting the authority of a State to regu-  
16 late the distribution and sale of vaccines; or

17 (2) restricting the right of any person (or class  
18 of persons) under any statute or common law to  
19 seek enforcement of a requirement relating to the  
20 distribution or sale of a vaccine or to seek any other  
21 relief.

22 (i) DEFINITIONS.—For purposes of this Act:

23 (1) The term “covered vaccine” means a vac-  
24 cine intended to prevent or mitigate the effects of in-  
25 fluenza or any biological terrorist agent.

- 1                   (2) The term “Secretary” means the Secretary  
2                   of Health and Human Services.

